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Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

No. 123.

JOHN ROONEY,

Plaintiff in Error.

vs.

THE STATE OF NORTH DAKOTA,

Defendant in Error.

Brief of Plaintiff in Error.

SETH NEWMAN,

B. F. SPALDING,

Attorneys for Plaintiff in Error.

Supreme Court of the United States.

JOHN ROONEY,

Plaintiff in Error.

vs.

THE STATE OF NORTH DAKOTA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

December 9th, 1902, information was filed in the office of the Clerk of the District Court of Cass County, North Dakota, charging John Rooney with having on the 26th day of August 1902 committed the offense of murder in the first degree, by shooting and killing one Harold C. Sweet while engaged in the commission of the crime of robbery in the first degree.

On the same day the accused pleaded not guilty.

The case was tried in January 1903 and on the 28th day of that month the Jury returned a verdict finding him guilty of murder in the first degree, as charged, and determining that he should be punished by death. March 20th, 1903, judgment and sentence were pronounced, that the plaintiff in error be conveyed to the penitentiary of the State of North Dakota at Bismarck, in said State, and there on the 26th day of June 1903 be, by the Warden or his deputy, hanged by the neck until dead.

It being discovered that a mistake had been made in fixing the date on which the execution should take place, in that the Statute of March 9th, 1903, under which the sentence was passed, provided that the execution should not take place until six months from the date of the judgment and sentence, and upon notice to show cause, on March 31st the judgment and sentence of March 20th were vacated and set aside, and plaintiff in error was sentenced to be conveyed to the penitentiary of the State of North Dakota, in the City of Bismarck in said State, there to be kept in close confinement until October 9th, 1903, and on that day be, by the Warden or his deputy, hanged by the neck until dead.

To this judgment and sentence plaintiff in error, by his attorney, objected and excepted, and the exception was allowed and made a part of the record.

Rooney perfected an appeal to the Supreme Court of the State of North Dakota, briefs were filed and oral arguments made for both sides, and on June 24th, 1903, the judgment of the District Court was affirmed by that Court.

SPECIFICATION OF ERRORS.

That in and by the said record and proceedings it appears that the judgment of the Supreme Court of the State of North Dakota which affirmed the judgment and sentence of the District Court of said State in and for the County of Cass, and was rendered and given against the said John Rooney, should have been rendered and given in his favor, and should have reversed said judgment and sentence of the said District Court of the State of North Dakota.

1.—Because said judgment and sentence of said District Court so as aforesaid affirmed by said Supreme Court was not authorized by the law in force at the time of the commission of the crime upon which said judgment was rendered, and for the punishment of which said sentence was imposed.

2.—Because said judgment so rendered and sentence so imposed were rendered and imposed under and in pursuance to a statute of the State of North Dakota passed after the commission of said crime.

3.—Because said statute under and pursuant to which said judgment was rendered and said sentence imposed inflicts upon the said John Rooney a different and greater punishment than the law annexed to said crime at the time it was committed, and alters the situation of the said John Rooney to his disadvantage.

4.—Because said judgment rendered and sentence imposed inflict upon the said John Rooney, a diffierent and greater punishment than the law annexed to said crime at the time it was committed, and alters the situation of the said Rooney to his disadvantage.

5.—Because said law under and pursuant to which said judgment was rendered and said sentence imposed is ex post facto as to said crime and as to said Rooney, and void.

ARGUMENT.

The statutes in force August 26th, 1902, fixing the punishment for murder in the first degree, the time, the manner and by whom the death penalty should be executed are as follows:

Revised Codes of North Dakota, 1899—

Section 7068. *Punishment for murder in first degree.* Every person convicted of murder in the first degree shall suffer death or be imprisoned in the penitentiary for life.

Section 7072. *Jury determines degree of murder.* The jury before whom any person prosecuted for murder is tried, shall, if they find such person guilty thereof, determine by their verdict, whether it is murder in the first degree or of murder in the second degree.

Section 7073. *Jury must determine punishment.* The jury before whom any person prosecuted for murder is tried, shall if they find such person guilty thereof, fix and determine by their verdict, the punishment to be inflicted, within the limits prescribed by law, * * * *

Section 8305. *Judgment of death. Warrant to execute.* When judgment of death is rendered, the judge must sign and deliver to the sheriff of the county, a warrant duly attested by the clerk under the seal of the court, stating the conviction and judgment, and appointing a day on which the judgment is to be executed, which must not be less than three months after the day in which the judgment is entered, and not longer than six months thereafter.

Section 8319. *How punishment of death inflicted.* The punishment of death must be inflicted by hanging the defendent by the neck until he is dead.

Section 8320. *In what jail defendent kept.* When there is no jail within the county, or whenever the officer having in charge any person under judgment of death, deems the jail of the county where the conviction was had, insecure, unfit or unsafe for any cause, such officer may confine such person in the jail of any other convenient county of the state and the jailer of any such convenient county shall receive and keep such person in the same manner as if he had been delivered to him by an officer of his own county; and the county in which said person was convicted shall pay all expenses of keeping and maintaining him in said jail.

Section 8321. *Where judgment of death executed.* A judgement of death must be executed within the walls or yard of the jail of the county in which the conviction was had, or within some convenient enclosure within said county.

Section 8322. *Execution. Who must or who may be preseut.* A judgement of death must be executed by the sheriff of the county

where the conviction was had, or by his deputy, one of whom at least must be present at the execution. * * * *

The provisions of Chapter 99 Laws of North Dakota 1903, page 119, under which plaintiff in error was sentenced, in so far as they are necessary for the decision of this case, are as follows:

Section 1. *Death penalty. How inflicted. Where.* The mode of inflicting the punishment of death shall be by hanging by the neck until the person is dead; and the warden of the North Dakota penitentiary, or in case of his death, inability or absence, the deputy warden shall be the executioner; and when any person shall be sentenced, by any court of the state having competent jurisdiction, to be hanged by the neck until dead, such punishment shall only be inflicted within the walls of the North Dakota penitentiary at Bismarck, North Dakota, within an enclosure to be prepared for that purpose under the direction of the warden of the penitentiary and the board of trustees thereof, which enclosure shall be higher than the gallows, and so constructed as to exclude public view.

Section 2. *Trial judge to fix date of execution. Compensation of executioner.* All executions of the death penalty by hanging

shall take place according to the provisions of this act, and on the day designated by the judge passing sentence, but before the hour of sunrise of the designated day, and the warden or deputy warden executing the sentence shall receive for his services twenty-five dollars, which amount shall be in addition to other compensation allowed said warden or deputy warden by law.

Section 3. *Duty of Sheriff. Fees.* When a person is sentenced to death, all writs for the execution of the death penalty shall be directed to the sheriff by the Court issuing the same, and the sheriff of the county wherein the prisoner has been convicted and sentenced, shall, within the next ten days thereafter, in as private and secure a manner as possible to be done, convey the prisoner to the North Dakota penitentiary, where the said prisoner shall be received by the warden, superintendent or keeper thereof, and securely kept in close confinement until the day designated for the execution, * * * *

Section 14. *Amendment.* That section 8305 of the revised codes of 1899, relating to judgment of death, warrant to execute, be amended so as to read as follows:

Section 8305. *Judgment of death. Warrant to execute.* When the judgment of death is rendered the judge must sign and

deliver to the sheriff of the county a warrant duly attested by the clerk under the seal of the court, stating the conviction and judgment and appointing a day upon which the judgment is to be executed, which must not be less than six months after the day in which the judgment is entered, and not longer than nine months thereafter.

Section 16. *Repeal.* All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Section 17. *Emergency.* Whereas, an emergency exists in this, that there are now several persons in the state under sentence of death before the first of July, 1903, and if the said persons are executed according to the existing laws the erection of several scaffolds will be necessary, which will entail considerable cost, therefore, this act shall take effect and be in force from and after its passage and approval. Approved March 9th 1903.

Section 5142, Revised Codes, N. Dak., 1899, is a general savings clause, but the Supreme Court of the State in this case holds that the statute of March 9th, 1903, expressly provides that it shall have the effect to extinguish the penalty fixed by the statute in force at the time Rooney's offense was committed. The statute is as follows:

"Sec. 5142. *Effect of repeal.* The repeal of any statute by the legislative assembly shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

The statutes of North Dakota regulating imprisonment in the penitentiary are as follows:

"Sec. 8304. *Imprisonment in penitentiary is at hard labor.* In all cases when by law a person is sentenced to imprisonment in the penitentiary, it shall be at hard labor, whether so designated by the jury or court or not."

"Sec. 8546. *Employment and discipline of inmates of penitentiary.* All persons sentenced to the punishment of imprisonment in the penitentiary and committed thereto shall be constantly employed for the benefit of the state. No communication shall be allowed between such persons and any person without the penitentiary except under such supervision as may be prescribed by the rules and regulations thereof. No person shall, without the consent of the warden, bring into or carry out any writing or any information to or from any inmate of the penitentiary. Persons committed to the penitentiary shall be confined in separate cells at night, whenever there are cells sufficient, and in the daytime all intercourse between them shall be prevented as far as practicable. All communications between male and female inmates shall be prevented."

Section 10, Art. 1, Constitution of the United States, "No State * * * shall pass any * * * ex post facto law, * * *

The difference between the punishment for murder in the first degree, where the death penalty is determined upon by the jury, under the law in force when this offense was committed, and the punishment fixed by the statute of March 9th, 1903, is:

1. Three months are added to the term of imprisonment before the execution.

2. Under the former law the imprisonment before the execution, in case there was no jail in the county, in which the conviction was had, or where the jail in such county was deemed insecure, unfit or unsafe, was in another convenient county in the state.

Under the latter law such imprisonment is in the penitentiary of the state, and in close confinement.

3. Under the former law the defendant was to be executed in the county in which he was convicted, by the sheriff of such county, or his deputy. Under the latter law, the defendant is to be executed at the penitentiary of the state by the warden or his deputy.

The plaintiff in error was sentenced under statute of March 9th, 1903.

Record P. P. 7 & 8.

Is the statute under which judgment was entered and sentence pronounced, as applied to plaintiff in error, and the crime of which he was convicted, ex post facto and void? This is the sole question in this case.

Section 8305. Revised Codes N. Dak., 1899 provides that the day appointed on which the judgment of death shall be executed * * "must not be less than three months after the the day in which the judgment is entered, and not longer than six months thereafter."

This section, as amended by section 14 of the statute of March 9th, 1903, provides that the day appointed on which the judgment of death shall be executed "must not be less than six months after the day in which the judgment is entered, and not longer than nine months thereafter."

If the imprisonment under the latter statute was to be in the county jail, as under the former, the statute would be ex post facto, because the punishment is increased by the three months added imprisonment. If three months could be added, three years or any number of years could be added to the term of inprisonment.

"No one can be criminally punished in this country, except according to the law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards by which the punishment is not increased."

Ex Parte Medley, 134 U. S. 106, L. Ed. Book 33 P. 835.

The Supreme Court of California in People v. McNulty, discussing the law as settled by this Court, and quoted above says:—

"By reference to section 1217 of the Penal Code above quoted, and the proposed amendment, it will be seen that the effect of the amendment, if valid, would be to change the period within which the execution must take place from not less than 30 nor more than 60 days to not less than 60 nor more than 90 days after judgment, the result of which is that under the amendment a convict might be kept alive and in dread and apprehension of a painful and ignominious death for 30 days longer than he could have been so kept under the old law. This change, also, it is strenously argued, and apparently not without authority to sustain the contention, makes the law ex post facto. For, in the first place, it is said that, although by a vast majority of persons condemned to die on the scaffold any postponement of the date of execution would be eagerly welcomed as a boon, there may be some men to whom it would be an aggravation of their suffering. And in the next place, it is contended that, even if this were not so, the principle that courts and legislatures may be allowed to change the punishment of crimes ex post facto in such manner as in their opinion renders the penalty lighter cannot be admitted without destroying the value of the constitutional guaranty, because there could be no certainty that the legislative or judicial discretion would always be wisely and mercifully exercised; and neither the legislator nor the judge is to be allowed to

measure the feelings of the culprit by his own. In short, the cases have gone to the extent of holding that a law which changes the punishment of past offenses in any manner whatever except by remitting a separable portion of the penalty previously prescribed, i. e., by reducing the amount of the fine, the number of stripes; the term of imprisonment, etc., is necessarily void as to all such offenses. It is unnecessary however, to cite or to criticize the cases in which this matter has been considered by courts whose decisions do not bind us as authority, when we have a decision of the Supreme Court of the United States, which is clearly in point.

People v. McNulty, 28th Pac., 816 (Cal).

Section 830, Revised Codes N. Dak., 1899, provides, "When there is no jail within the county, or whenever the officer having in charge any person under judgment of death, deems the jail of the county where the conviction was had, insecure, unfit or unsafe for any cause, such officer may confine such person in the jail of any other convenient county of the state, and the jailer of any such, convenient county, shall receive and keep such person in the same manner as if he had been delivered to him by an officer of his own county." * * * *"

We suppose that when there was a jail in the county in which the conviction was had, which was not deemed insecure, unfit or unsafe for any cause, a person under judgment of death, could have been confined in such jail. This, however is the only statute upon the subject and does not directly so provide.

Section 3 of the act of March 9th, 1903 provides that persons sentenced to death shall, within ten days thereafter, be conveyed to the North Dakota penitentiary, "and securely kept in close confinement until the day designated for the execution * *."

Imprisonment in the penitentiary as compared with imprisonment in the county jail is an increased and greater punishment.

"Instead of confinement in the ordinary county prison of the place where he and his friends reside; where they may, under the control of the sheriff, see him and visit him; where the sheriff and his attendants must see him; where his religious adviser and his legal counsel may often visit him without any hindrance of law on the subject, the convict is transferred to a place where imprisonment always implies disgrace and which, as this court has judicially decided, in Ex Parte Wilson, 114 U. S. 417 (29: 909); Parkinson v. U. S. 121 U. S. 281 (30: 959), and U. S. v. Dewitt 128 U. S. 393 (32; 485), is itself an infamous punishment, * * *."

Ex Parte Medley 134 U.S. 106 L. Ed Book 33 P. 835.

In People v. McNulty 28 Pac. 816 (Cal.) discussing this question and quoting the above language from the Medley case, this is said:—

"We have seen that under the amendments of 1891 a person convicted of murder in the first degree and sentenced to death must within 10 days thereafter be delivered

to the warden of the state prison, and be confined by him for from 50 to 80 days in said prison. If it is in the power of the legislature to add to the penalty of death by hanging a previous imprisonment in the penitentiary for 80 days, the term, might under the same power, be extended to years."

The statute of California considered in People v. McNulty, changed the punishment from imprisonment in the jail not less than 30 nor more than 60 days, to imprisonment in the penitentiary not less than 60 nor more than 90 days, and the prisoner was to be conveyed to the penitentiary within 10 days from the time of judgment.

Justice Harrison, writing the dissenting opinion says:—"I regret that I am unable to concur in the foregoing opinion and judgment. I concur in that portion thereof which holds that the effect of the amendments of 1891 is to make such a change in the punishment prescribed for murders committed prior to their enactment as to bring them within the definition of an ex post facto law, and therefore, that the punishment therein prescribed cannot be inflicted upon the defendant."

Under the act of March 9, 1903, under which judgment was entered against plaintiff in error, the imprisonment in the penitentiary is in close confinement. The statute provides that the prisoner shall be "securely kept in close confinement until the day designated for the execution, * * *."

We contend that close confinement, as compared with imprisonment in the county jail, is added, increased and more severe punishment. What "close confinement," as here used, means, does not so much depend upon the technical construction of the words themselves, as upon the character of the prison in which the prisoner is confined. Section 8304 R. C. N. Dak., 1899, provides "In all cases when by law a person is sentenced to imprisonment in the penitentiary, it shall be at hard labor, whether so designated by the jury or court or not."

Section 8546, R. C., N. Dak., 1899, provides, "All persons sentenced to the punishment of imprisonment in the penitentiary and committed thereto shall be constantly employed for the benefit of the state. No communication shall be allowed between such persons and any person without the penitentiary except under such supervision as may be prescribed by the rules and regulations thereof. No person shall, without the consent of the warden, bring into or carry out any writing or any information to or from any inmate of the penitentiary. Persons committed to the penitentiary shall be confined in separate cells at night, whenever there are cells sufficient, and in the daytime all intercourse between them shall be prevented as far as practicable. All communications between male and female inmates shall be prevented."

The prisoner is, therefore, committed to a prison where he is to be kept in close con-

finement, which, at least must mean, that he must be kept in a cell; he is committed to a prison in which, under the law regulating the imprisonment of all other prisoners, all communication and all intercourse between the inmates is prohibited, and in which no communication between the prisoner and persons without the penitentiary, except under such supervision as may be prescribed by the rules and regulations of the prison, is permitted.

This character of inprisonment is substituted "Instead of confinement in the ordinary county prison of the place where he and his friends reside; where they may, under the control of the sheriff, see him, and visit him; where the sheriff and his attendants must see him; where his religious adviser and his legal counsel may often visit him without any hindrance of law on the subject."

In the opinion of the State Supreme Court in this case, it is stated in several places that it is contended that, this sentence being for six months and nine days, or nine days more than the maximum imprisonment under the former statute, the nine days additional imprisonment constitutes, in part, the increased or added punishment of which we complain. There is some error about this. Our contention in the State Court, as here, was that the statute under which the defendant is sentenced is, as to him and the crime

of which he was convicted, ex post facto and void, and that no sentence and no judgment can be given against him under that statute, and that since the statute in force at the time of the commission of the offense charged has been repealed without a saving clause, no judgment and no sentence can be passed against the plaintiff in error.

We are dealing with the question of the constitutionality of this statute, and nothing else. If the statute is constitutional, the judgment must stand. If it is unconstitutional, it must be vacated and set aside. We are not now, and never have been concerned with the particular terms of the judgment entered.

It is settled law that "No one can be criminally punished in this country, except according to the law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards by which the punishment is not increased." The State Supreme Court has held in this case that imprisonment in the penitentiary not less than six months nor more than nine months in close confinement, as compared with confinement in the county jail not less than three nor more than six months, is not an increase of the punishment.

We most respectfully submit that the judgment of the Supreme Court of the State should be reversed.

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